STATE OF WISCONSIN

COURT OF APPEALS
DISTRICT I

Case No. 2020AP1228-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SALAR ZANGANA,

Defendant-Appellant.

Appeal of Written Decisions and Final Orders Denying Defendant-Appellant's Postconviction Motion on July 7, 2020 and Motion for Reconsideration on July 13, 2020, in Milwaukee County Circuit Court Case No. 18CM1193, Hon. David A. Feiss, Circuit Judge, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED FOR REVIEW

Did the trial court erroneously exclude defense evidence from trial about RZ's apology to defendant Zangana, "for those things that I did to you," that was relayed in a text message sent from her husband's phone to Zangana, and unduly prejudiced Zangana's right to present a defense – when the defense contended during trial that the apology (1) was admissible for impeachment of RZ as a prior inconsistent statement, (2) was not subject to a claim of marital privilege, and, at the postconviction stage, that the apology (3) was admissible extrinsic evidence of such a statement?

The trial court answered: (1) the text message was inadmissible hearsay (A. App. 107); (2) the text message fell within the marital privilege (Id.); and (3) the extrinsic evidence argument had been forfeited because trial counsel did not argue that it was a basis for admission of the apology (A. App. 108).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Appellant does not request oral argument because, consistent with Wis. Stat. (Rule) § 809.22(2)(b), the written arguments can fully develop the theories and legal authorities on each side so that oral argument would be of marginal value.

Publication is not permitted under Wis. Stat. (Rule) § 809.23(b)4 because this is a single-judge appeal.

STATEMENT OF THE CASE

Zangana was charged in counts 1 and 2 of the complaint with committing misdemeanor batteries of his wife

(GZ) and his daughter (RZ) on May 1, 2018. Count 3 alleged disorderly conduct during the same incidents. A jury considered the trial evidence on March 27, 28 and 29, 2019.[1] The jury returned verdicts of guilty on counts 1 and 3, but because the jury could not reach a verdict for count 2, a mistrial was declared. Zangana was sentenced on May 3, 2019 on counts 1 and 3 to 18 months' probation with conditions, including a stayed 30-day jail sentence and payment of a domestic abuse assessment.

STATEMENT OF FACTS

In his opening statement the prosecutor told the jury:

- that the evidence supporting verdicts of battery and disorderly conduct would include the testimony of GZ, RZ, and police officers, a recorded 911 call placed by RZ, and police photographs of GZ, RZ, and interior rooms (R. 72 at 69-71);
- that on April 28, 2018 an argument took place in the Zangana home (in which Salar no longer resided) involving Salar, GZ and RZ (Id. at 69); and
- that during the argument Salar threatened to kill "everyone in the house," and he slapped and punched GZ in the head, then kicked her in the head, and then "repeatedly" punched RZ in the face and head (Id. at 69-70).

[1]Transcript page references for proceedings are indicated throughout this brief in parentheses by the indexed appeal record document number followed by a transcript page number, viz., "R. 71" (for trial proceedings of March 27 A.M.); "R. 72"(for trial proceedings of March 27 P.M.); "R. 73" (for trial proceedings of March 28, 2019); "R. 74" (for trial proceedings of March 29).

In his defense opening statement, defense counsel emphasized:

- that because the jury would likely hear differing versions from witnesses, the evidence would not be consistent about whether and how GZ and RZ had been punched or kicked, and whether a knife was involved (Id. at 72); and
- that the photo evidence would be inconsistent with the alleged injuries, either from punches or kicks, and the involvement of a knife (Id. at 73).

RZ testified that: she was living in the home with her mother, three siblings and husband; Salar and GZ were going through a divorce and he had not been living at home for weeks (Id. at 77-78); Salar entered the kitchen from the side door and started yelling that he would "kick" everybody out and would "kill [them] all" (Id. at 81); he then punched GZ's head (Id. at 84-86), and all over face numerous times (at least more than three) (Id. at 112-113), "landing these strikes," even though she sought to block the blows and protect her head (Id. at 115, 85), as he grabbed her by the neck (Id. at 83); and then, after she (RV) pulled him away from GZ from the kitchen into the living room, he punched RV continuously in the face (Id. at 87-89), and kicked her whole body, numerous times, when she fell to the floor (Id. at 107, 122-123) with her being struck at least ten times (Id. at 124); and she then ran outside and called the police (Id. at 90).

A recording of her call (Exhibit 1) was played ((Id. at 92-99) and in the call she said that her father had a knife, although she did not "physically see" the knife (Id. at 95). RZ identified photos (Exhibits 3 and 4) that showed that her ear was red and bruised (Id. at 105), but that photos of the kitchen area taken by police right after the incident (Exhibits 8-11) showed no damage, no broken glass, nothing knocked to the

floor, no tipped over chairs and no spills from open soda cans 6) and juice glasses (R. 73 at 10-14, 38).

GZ testified through an Arabic interpreter that: after she let Salar in from outside through the door into the kitchen, he started screaming at her using foul words, and then pulled her hair, choked her, and punched her in the head (Id. at 46-48); then as RZ intervened, he started hitting her (Id. at 49). She identified photos (Exhibits 13-16) that showed redness where she was struck and slapped (Id. at 60).

Officer Budish testified that upon arriving at the Zangana home in response to a 911 call about a "battery DV" involving a weapon, he observed that: RZ was screaming that Salar had beat her and GZ, and that he had a knife. (Id. at 88); RZ and GZ declined medical attention (Id. at 89); RZ later said when interviewed that Salar had never held a knife to threaten them (Id. at 93, 136). Budish also testified that: in his incident report he wrote that he did not see "any signs of redness or injury" (Id. at 104); GZ did not mention having been choked (Id. at 108); he did not see any signs of a physical altercation, such as broken or spilled items, or blood (Id. at 113); but in a GZ photo (Exhibit 15) he did see some "flushing pink" discoloration as a sign of injury (Id. at 131).

ARGUMENT

THE TRIAL COURT'S EXCLUSION OF IMPEACHMENT EVIDENCE PROFERRED BY THE DEFENSE CREATED UNDULY PREJUDICIAL, CONSTITUTIONAL ERROR.

At the trial the circuit court prejudiced Salar Zangana's right to present a defense when it erroneously barred the defense from introducing evidence of RZ's prior inconsistent statements, because those statements were not hearsay and were not subject to a marital privilege of confidentiality. The court improperly blocked defense counsel from presenting a defense because: (1) the evidence that RZ had made an apology to her father for having accused him of battery or disorderly conduct was not hearsay; and (2) the evidence that she had approved or authorized her husband's sending of such a message to her father, by confirming that the substance of the message was consistent with what she had said to him, was not covered by the marital privilege.

The issues arose during defense counsel's cross-examination of RZ, when he asked a series of questions to lay a foundation for impeachment of her credibility, using evidence of her prior inconsistent statements. Counsel began by asking her to review a text message (marked as Exhibit 12), which she said she was aware of, that had been sent on her husband's cell phone to her father (R. 73 at 22-24).

> Q Okay. Ma'am, I'm going to show you what's been marked as Exhibit 12. Let me know when you've had enough time to review that.
>
> A Okay.
>
> Q And that appears to be a -- that would appear to be a screen shot from a -- from a cell phone. Would you agree that's accurate?
>
> A Yes.

Q And it's messages back and forth in a text chain; is that accurate?

A Yes.

Q And at the very top where it lists a phone number, that is your husband's phone number, correct?

A Correct.

Q And you would agree that this purports that there was a message sent Friday, February 15th of 2019 at 8:24 p.m., correct?

A Yes.

* * *

Q Are you able to translate it to English what that message on February 15th says?

A Yes. It says, "Hi, dad."

Q Okay. Ms. Zangana, your testimony is that you are not the person who sent this text message, correct?

A Correct.

Q But you've had a chance to review. You understand the contents of what that message says, correct?

A Yes.

Q The contents of this message, without saying them at this point, would be consistent with discussions?

MR. FLAHERTY: I'm going to object. She's not the person who made that statement. It's an out-of-court statement and it has no relevance without the declarant here.

MR. KENNEDY: I'm not asking for the actual statement to be read in or sustaining of the objection. I'm simply asking if what is said is consistent with her thoughts and with her discussions with her husband in laying foundation then for that to be admissible.

The text message read:

Hi Daddy, I am R[]. Either tonight or tomorrow I will have a baby. I am sorry and ask your forgiveness for those things I did against you. I am very regretful. I know I was wrong. Please forgive

> me and free my conscience just in case (in case something goes wrong during childbirth).[2]

The prosecution's objection was sustained. Later, during a sidebar conference, the court continued (Id. at 51-52):

> The first sidebar, when Mr. Kennedy on cross-examination of R[Z] began to ask questions about a text that was allegedly sent by her husband on February 15th of this year, and it established that the text was sent. When she was asked to read it, the State objected on hearsay grounds, and then counsel continued with a question regarding whether the text message was consistent with communications between R[Z] and her husband. The State requested a sidebar. We went into chambers.
>
> The Court indicated that it felt there were problems here, both with hearsay and that the next question was going to violate the witness's marital privilege. Mr. Kennedy indicated that it was his belief that marital privilege was inapplicable because the statement was outside of any criminal or litigation proceedings. The Court indicated that its belief and view of the marital privilege that it covers any confidential communication between a husband and wife and is not limited to statements made in any type of litigation.
>
> So the Court did indicate that it would sustain the objections and would not allow further questioning with regard to the text message. Mr. Flaherty, anything you want to add with regard to that statement?
>
> MR. FLAHERTY: No, Your Honor.
>
> THE COURT: Mr. Kennedy.
>
> MR. KENNEDY: I think that's an accurate recitation of the sidebar, but the only thing I would add, just at this point, as part of the record with respect to the confidentiality. Again, this is a text that is then sent to a third party, so while the specific communications between R[Z] and her husband would fall under that privilege, I believe that a statement sent to a third party would fall without that, even if that's reflective of a summary or her statements that are within the confidential marital privilege.

---

[2] This is the Kurdish to English translation in the defendant's affidavit (R. 48) that sets out Exhibit 12.

> THE COURT: And the Court's view was that the text by her husband would have been hearsay, and then when you asked if that statement was consistent with communications, that question was improper because it would have gone into a marital privilege, but your objection, in your position, I think you've made a good record on.

At another point, before further testimony was taken, the issue was revisited by defense counsel when he explained that he was seeking RZ's admission that she held discussions with her husband that were inconsistent with her testimony, which then led to her husband texting her apology to her "Daddy" for having made a wrongful accusation against him. The defense had presented the text to jog her memory, and if she did not admit to the discussions or the statement, to lay a proper foundation for impeachment, through later testimony from her husband (Id. at 78-79):

> So once again, I believe that because of the nature of what was being asked would not be contrary to any legal interest of R[Z] or her husband, that I believe she would be permitted to testify to discussions they may have had predating the text message that was sent. And, again, I realize at this point I may be making a record perhaps for appeal but I did want to make sure that I made this clear while we RZ still in the building in case that changes any procedure.
>
> THE COURT: All right. The Court's belief is still that the privilege covers confidential communications between spouses, and the question that you were asking called for the witness to disclose a confidential communication. And so therefore the Court believed that the privilege was applicable, but you have made your record.
>
> MR. FLAHERTY: The State would just like to add that even aside from that there's still the hearsay issue with regard to those conversations.
>
> THE COURT: That's accurate as well.

These points in the trial establish that the defense had a solid basis (with the text message addressed "Hi Daddy" and marked as Exhibit 12) to question RZ about whether she had made prior inconsistent statements. The defense was preparing, either through RZ's testimony or by subpoenaing

her husband, to show that RZ's husband had sent the text message in which RZ voiced the apology for having made her accusations. Defense counsel had a good faith basis to proceed with his questioning because the communication had run from RZ to her husband, and then from her husband to her father, because it arrived on defendant's cellphone with RZ's husband's cellphone listed as the source.

A. RZ's apology was proper impeachment evidence, was admissible as a prior inconsistent statement, and therefore was not hearsay.

The trial court's cryptic hearsay finding was devoid of any developed explanation or statement of its reasoning. The prosecutor's hearsay objection was equally unenlightening: he merely pinned his hearsay objection to the fact that it was "an out of court statement." But, of course, Wis. Stats. § 908.01(4) sets out broad categories of out-of-court statements "which are not hearsay." Wisconsin's evidence rules are clear: it is not hearsay to cross-examine a witness about their prior inconsistent (out-of-court) statements for the purpose of challenge the credibility of their testimony. Wis. Stat. § 908.01(4)(a) 1 provides:

> "**4) Statements which are not hearsay**. A statement is not hearsay if: (a) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is: 1. Inconsistent with the declarant's testimony.

(Emphasis in bold added). *See, Vogel v. State*, 296 Wis.2d 372, 386, 91 N.W.2d 838, 845 (1980) ("The statement in question was inconsistent with Lindsey's testimony at trial and he was available for cross-examination concerning it. Under sec. 908.01(4)(a)1, no more is required"). Specifically with regard to statements of apology from an accuser, the court in *People v. Jones*, 57 Cal.4th 899, 956, 306 P.3d 1136, 1175 (Cal. 2013), for example, stated: "the alleged apology

could be considered a statement that was inconsistent with her accusations of assault and thus admissible."

Defense counsel was entitled to elicit in his cross-examination whether RZ would admit either to having discussions with her husband in which she said she was wrong to have accused her father, or to approving the text message to the same effect. Defense counsel also was entitled to examine RZ about the text message to lay the foundation, if she did not admit to approving it, for its later introduction as extrinsic evidence. Wis. Stat. § 906.13(2)(a), regarding evidence of prior statements by a witness provides:

> **(2) Extrinsic evidence of prior inconsistent statement of a witness.** (a) Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless any of the following is applicable: 1. The witness was so examined while testifying as to give the witness an opportunity to explain or to deny the statement. 2. The witness has not been excused from giving further testimony in the action.3. The interests of justice otherwise require.

(Emphasis in original).

Under these two prior inconsistent statement rules, Zangana's defense counsel was on solid footing when he sought to elicit RZ's testimony about the (1) inconsistent discussions with her husband that led up to the apology and (2) the inconsistent apology itself that was directed by a text message to her father.

B. The apology evidence was not covered by the marital privilege of confidentiality.

The privilege issue can be broken down into two parts: did the marital privilege bar the defense from soliciting RZ's testimony on discussions with her husband, if she expressed regret about her accusations against her father and wanted to apologize? and did the privilege bar extrinsic evidence of the

apologetic text message itself for impeachment, if she intended the message be conveyed to her father?

Anticipating that RZ might deny either that she had discussions with her husband about such an apology, or that she had intended that the text message be sent, defense counsel was preparing to subpoena her husband for purposes of having the text message admitted as extrinsic evidence under Wis. Stat. § 906.13(2)(a)(R. 73 at 167-169). But the trial court ruled that the husband would not be allowed to testify and could not be subpoenaed, also based on the marital privilege, with defense counsel first stating his attempt and the court stating its reasoning:

> MR. KENNEDY: . . . I was attempting to get a subpoena generated for her husband based upon her testimony first thing this morning.
>
> * *
>
> *
>
> THE COURT: I completely accept your explanation, Mr. Kennedy. I mean, we talked about it. *I didn't let you have time to do that because I think it was appropriate.* [sic] *"T]he husband couldn't have testified anyhow, ...*

(R. 73 at 167-169) (Emphasis added).

The trial court was mistaken. If there is an intent to reveal or to disclose to another the communication of one spouse to the other, confidentiality is waived and relinquished.[3] RZ wanted the communication (as the text message greeting "Hi Daddy" revealed) to be disclosed and sent to her father. In fact, RZ is talking to her father in the

[3] RZ never claimed or asserted that she was invoking the privilege; only the prosecutor, who had no standing the assert the privilege, raised the issue. Importantly, the privilege under Wis. Stat. § 905.05(2) expressly limits its application to barring one spouse from testifying against the other in prescribed cases, along with limiting those who may assert the marital privilege. Those were were two more flaws in the prosecution's objection, and the trial court's ruling.

message, not to her husband. So, for one, the marital privilege did not bar the defense from soliciting RZ's testimony on discussions with her husband about wanting to apologize, and, secondly, the privilege did not cloak the text message itself with confidentiality. In cases where a spouse is being used to convey a message to some third person, this is not a communication "between" spouses, and the policy of the marital privilege, that those communications remain undisclosed in a court matter, when the communicating spouse does not intend that they be heard or seen by the spouses only, is not at play:

"[W]herever a communication, because of its nature or the circumstances under which it was made, was obviously not intended to be confidential, it is not a privileged communication." *Wolfle v. United States*, 291 U.S. 7, 14 (U.S. 1934) (citing *Truelsch v. Miller*, 186 Wis. 239, 249, 202 N.W. 352, 38 A.L.R. 914). *See also, Kain v. State*, 48 Wis.2d 212, 216, 179 N.W.2d 777, 780 (1970) ("The statute protects communications between spouses that are private. A communication between spouses is not 'private' where a third party has access to the same information." *See also*, *United States v. Livingston*, 272 Fed. Appx. 315, 317 (5th Cir. 2008) (no privilege where defendant asked his wife to relay his communication to his wife's sister); *United States. v. Strobehn*, 421 F.3d 1017, 1020 (9th Cir. 2005) (messages to wife, parents, and other relatives written on sheets of paper and left on kitchen table in apartment shared with wife and children treated message to wife not privileged because he intended that she convey the other messages to their addressees); *Lynch v. State*, 2 So. 3d 47, 65 (Fla. 2008) (no privilege for suicide message that communicating spouse asked the recipient spouse to reveal to his murder victim's family).

The trial court also procedurally erred during the

postconviction review of the issues. The court properly noted (A. App. at fn. 4) that the prosecution had failed to address both the inapplicability of the marital privilege and the extrinsic evidence admissibility issues in its response to defendant's postconviction motion. Yet the prosecution's choice to be silent carried no consequences. Despite its recognition that C*harolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) deemed unrefuted arguments to be conceded, the trial court simply noted the absence of any opposing argument from the prosecution and then ruled in its favor, despite the forfeiture. Yet, in a completely arbitrary reversal of that approach, the trial court also ruled that Zangana could not argue that the apology statement evidence was admissible under the extrinsic evidence rule because "that basis for admission was not presented at the time of trial and . . . therefore [it was] forfeited." (A. App. 108).

The trial court's arbitrarily inconsistent, forfeiture-of-argument rulings should not only be criticized, it should cause this court to reverse the trial court's evidentiary conclusions and grant a new trial. The trial court's forfeiture ruling against Zangana is contrary to *State v. Holland Plastics, Co.*, 111 Wis. 2d 497, 505, 331 N.W.2d 320 (1983) which held that additional argument on issues already raised in the trial court did not violate the general rule against raising issues for the first time following trial and on appeal. The Court stated: "This is merely an additional argument on issues already raised by the defendants. . . ."

Also, by ruling that Zangana's extrinsic evidence argument was forfeited, the court overlooked the clear function of a post-conviction motion under Wis. Stat. § 809.30. Under § 809.30(2)(h) a defendant is required to file a motion for postconviction relief "before a notice of appeal is filed unless the grounds for seeking relief are sufficiency of

the evidence or issues previously raised." By its very terms, this provision designates a motion for postconviction relief as the proper vehicle for raising issues that were not previously raised during the pretrial or trial proceedings. Our appellate courts have made this clear as well. *See, e.g., State v. Evans*, 2004 WI 84, ¶ 29, 273 Wis.2d 192, 212, 682 N.W.2d 784, 794 ("a postconviction motion is required prior to an appeal for issues not previously raised."); *State v. Walker*, 2006 WI 82, ¶ 30, 292 Wis.2d 326, 339, 716 N.W.2d 498, 504 ("§ 809.30(2)(h) . . . embod[ies] the policy that it is better to give the circuit court, which is familiar with the facts and issues, an opportunity to correct any error it has made before requiring an appellate court to expend its resources in review."). The trial court's rejection of Zangana's extrinsic evidence argument was a procedural error of prejudicial consequence. Defense counsel should have been allowed to subpoena RZ's husband for that purpose.

C. The trial court's error led to a violation of Zangana's constitutional right to confront and cross-examine his accuser.

The trial court's hearsay and privilege rulings handcuffed defense counsel's ability to impeach the credibility of a central, crucial witness for the prosecution. The court's prohibition on cross-examination of RZ and its exclusion of Exhibit 12 and any testimony about it, was reversible, constitutional error.

> Whether the exclusion of evidence is of a constitutional dimension depends on the trial court's reason for the exclusion and the effect of the exclusion. In determining whether the exclusion of evidence violates a defendant's confrontation rights, the Supreme Court has identified the following factors for a reviewing court to consider: the strength of the prosecution's overall case; the importance of the witness's testimony in the prosecution's case; whether the testimony was cumulative; the presence or absence of evidence corroborating or contradicting

> the testimony of the witness on material points; and the extent of cross-examination otherwise permitted.

Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986). Exclusions of evidence are unconstitutional if they "significantly undermine fundamental elements of the accused's defense." *United States v. Scheffer,* 523 U.S. 303, 308 (1998).

RZ's testimony went directly to whether or not Salar Zangana had repeatedly battered his wife or had acted in a disorderly manner in his own house. There was conflicting testimony and physical evidence as to both charges. Hence, RZ's testimony, and her credibility, were key components to the strength of the State's case.

The prosecution placed particular emphasis on RZ's testimony and her credibility to prove that two counts for which Salar Zangana was convicted. In his closing arguments, the prosecutor made repeated references to the importance and credibility of RZ's testimony for those counts. For example, he stated:

> So the first pieces of evidence that you heard in this trial were the testimony of Rava Zangana. So she told you what she observed on April 28th, 2018. She told you that she came up the stairs after she heard screaming and pounding, and she saw her parents screaming at each other. You heard that she observed her father choking her mother, grabbing her by the neck. She observed her father pulling her mother's hair. She observed her father hitting her mother.

(R. 74 at 19-20).

> A year after the incident, is she going to come in here and bear her sole [sic] to 13 strangers and cry in front of them and subject herself to cross-examination about a lie? It doesn't make sense. She testified that she just recently gave birth. She made sacrifices to be here. She told you that during the birth she was unconscious for a while. This is a hectic time for her. She was here. You saw her bear her emotion on the stand. We can believe Rava's testimony.

(Id. at 31-32).

The restrictions on defense counsel's cross-examination of RZ, and the court's refusal to allow the defense to subpoena and present her husband's testimony, deprived Zangana of the right to confront the crucial witness against him and to present a defense. "The jury cannot search for the truth if the trial court erroneously prevents the jury from considering relevant admissible evidence on a critical issue in the case." *State v. Cuyler*, 110 Wis.2d 133, 327 N.W.2d 662, 667 (1983). "[O]ne of the essential ingredients of due process in a criminal trial [,] . . . the right to a fair opportunity to defend against the State's accusations." *State v. Johnson*, 118 Wis.2d 472, 479, 348 N.W.2d 196 (1984).

Accordingly, the trial court's exclusionary rulings were not harmless errors. Instead, they constituted unduly prejudicial, constitutional errors.

CONCLUSION

Based upon the foregoing arguments, Salar Zangana, respectfully requests that this court reverse his conviction and grant a new trial.

Dated at Milwaukee, Wisconsin, October 5, 2020.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 4,489 words.

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CERTIFICATE OF COMPLIANCE
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I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated at Milwaukee, Wisconsin, October 5, 2020.

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